

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

VICTOR KENNARD BOONE-BEY,

Defendant-Appellant.

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UNPUBLISHED

March 13, 2003

No. 232924

Oakland Circuit Court

LC No. 99-168672-FC

Before: Murphy, P.J., and Cavanagh and Neff, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions for voluntary manslaughter, MCL 750.321, one count of possession of a firearm by a felon, MCL 750.224f, and two counts of possession of a firearm during the commission of a felony, MCL 750.227b. Defendant was sentenced to nineteen to sixty years' imprisonment for the manslaughter conviction, six to twenty years' imprisonment for the felon in possession of a firearm conviction, and two years' imprisonment for the felony-firearm convictions. We affirm.

This case arises out of a fatal shooting at the victim's home in a dispute over a radio. Defendant, Bobby Woolen (defendant's brother), D'Juan Yingling, and Robert Jones confronted the victim in the doorway of the home. The victim was then shot, and the central issue at trial concerned the identification of the shooter; defendant asserting that Jones shot the victim, and the prosecutor arguing, of course, that defendant committed the killing. The victim's young son, present in the home at the time of the shooting, identified defendant as the shooter, as did Jones. Woolen, in a statement to police that was introduced to the jury after Woolen invoked the Fifth Amendment, claimed that defendant fired the gun. Yingling and defendant testified that Jones was the shooter.

First, defendant argues that the trial court erred in permitting James Rourke, a sergeant with the Oak Park police, to testify regarding statements made to him by Woolen. Although we agree that the statements should not have been admitted at trial, we find that such error was harmless beyond a reasonable doubt.

"This Court reviews for an abuse of discretion the trial court's decision to admit or exclude evidence and will reverse only where there is a clear abuse of discretion." *People v McCray*, 245 Mich App 631, 634-635; 630 NW2d 633 (2001), citing *People v Starr*, 457 Mich 490, 494; 577 NW2d 673 (1998). "When the decision regarding the admission of evidence

involves a preliminary question of law, such as whether a statute or rule of evidence precludes admissibility of the evidence, the issue is reviewed de novo.” *People v Washington*, 251 Mich App 520, 524; 650 NW2d 708 (2002). Similarly, because the issue here implicates the Confrontation Clauses of the state and federal constitutions,<sup>1</sup> the issue is reviewed de novo. *Id.* at 524-525.

The statements in question were admitted pursuant to MRE 804(b)(6),<sup>2</sup> which provides in relevant part:

(6) *Other Exceptions.* A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact, (B) the statement is more probative on the point for which it is offered than any other evidence that the proponent can procure through reasonable efforts, and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence.

In *People v Welch*, 226 Mich App 461, 466-467; 574 NW2d 682 (1997), this Court set forth the principle that, in order to bear “adequate indicia of reliability” so as to be properly admissible under the Sixth Amendment, hearsay testimony must either fall within a “firmly rooted hearsay exception” or occur under circumstances with “particularized guarantees of trustworthiness” considering the totality of the circumstances surrounding the making of the statement and those rendering the declarant to be worthy of belief. Further, the trustworthiness requirement serves as a “surrogate for the declarant’s in-court cross-examination,” and thus, the requirement is satisfied if the court can conclude that cross-examination would be of marginal utility. *Id.* at 467-468.

In *People v Lee*, 243 Mich App 163, 178; 622 NW2d 71 (2000), this Court set forth the following factors used in order to establish the indicia of reliability for purposes of the catch-all exceptions: (1) the spontaneity of the statements; (2) the consistency of the statements; (3) lack of motive to fabricate or lack of bias; (4) the reason the declarant cannot testify; (5) the voluntariness of the statements, i.e., whether they were made in response to leading questions or under undue influence; (6) personal knowledge of the declarant about the matter on which he spoke; (7) to whom the statements were made, e.g., a police officer who was likely to investigate further; and (8) the time frame within which the statements were made. In reviewing such factors, the court may not consider whether evidence produced at trial corroborates the statement. *Id.*

We find that the trial court erred in admitting Woolen’s statements pursuant to MRE 804(b)(7). Specifically, we question the trustworthiness of Woolen’s statements.<sup>3</sup> First,

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<sup>1</sup> US Const, Am VI; Const 1963, art 1, § 20.

<sup>2</sup> We note that MRE 804 was recently amended to add an extra provision in September 2001, which has affected the numbering of MRE 804. The catch-all exception to the hearsay rule may now be found under MRE 804(b)(7). We shall reference MRE 804(b)(7) for the remainder of this opinion.

Woolen's statements were not spontaneous, but rather, were made in response to an interrogation at the police station. Second, Woolen initially informed Rourke that an unknown black male was the person that shot the victim, but later changed his story and indicated it was defendant that shot the victim after Rourke informed Woolen that the victim's son identified defendant as the shooter. Woolen later informed a paralegal for an attorney representing him, that the person who shot the victim was Jones. Woolen informed the paralegal that he gave the police three different versions of what happened on the night of the incident. Thus, it is apparent that Woolen's story lacked consistency. Third, Woolen clearly had a motive to fabricate and did not demonstrate a lack of bias. The victim's son testified that Woolen handed defendant the weapon used to kill the victim; however, Woolen informed Rourke that he never handed defendant a gun. Thus, it would appear as though Woolen could have been implicated in the shooting and that he attempted to avoid responsibility for the shooting. Fourth, Woolen utilized his Fifth Amendment right to avoid testifying at defendant's trial. This lends additional support for the theory that Woolen may have attempted to avoid responsibility as an accomplice in this case. Although Rourke indicated that he had not spoken with the victim's son regarding Woolen handing defendant the gun, Rourke admitted that he may have told Woolen that it was in his best interest to speak with him. Fifth, it appeared that Woolen's statements were not necessarily voluntary. Woolen was interrogated at approximately 3:00 a.m. following the shooting. It was only after Rourke informed Woolen that the victim's son identified defendant as the offender that Woolen allegedly implicated defendant. Sixth, testimony revealed that Woolen would have had personal knowledge of the incident, which supports the admission of the testimony as Woolen was an eyewitness to the shooting. Seventh, the statements were made to a police officer. The trial court acknowledged that this factor weighed heavily against the admission of Woolen's statements. Finally, the statements were given the day after the incident, which is relatively soon after the incident took place. When reviewing the factors in light of the totality of the circumstances, we conclude that Woolen's statements lacked the adequate indicia of reliability required for a hearsay statement to be admissible under the catch-all exception to the hearsay rule.<sup>4</sup>

Trial errors or nonstructural errors have been defined as those that occur during the presentation of a case to the jury, and which may therefore be quantitatively assessed in the context of other evidence presented in order to determine whether an admission was harmless beyond a reasonable doubt. *People v Anderson (After Remand)*, 446 Mich 392, 405-406; 521 NW2d 538 (1994). A preserved claim of error regarding one's right to confrontation has been defined as one of nonstructural constitutional magnitude. See *Arizona v Fulminante*, 499 US 279, 306-307; 111 S Ct 1246; 113 L Ed 2d 302 (1991). "If the error is not a structural defect that defies harmless error analysis, the reviewing court must determine whether the beneficiary of the error has established that it is harmless beyond a reasonable doubt." *People v Carines*, 460 Mich

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(...continued)

<sup>3</sup> We note that Woolen's availability was not at issue in this case, as both the prosecution and defense counsel agreed that Woolen was unavailable because he was exercising his Fifth Amendment right against self-incrimination.

<sup>4</sup> We reject the prosecutor's argument that the testimony was proper under MRE 803(2)(excited utterance exception to hearsay). There is insufficient factual support in the record to apply the exception.

750, 774; 597 NW2d 130 (1999), citing *Anderson, supra*. Thus, although the hearsay statement was improperly admitted, the erroneous admission of hearsay evidence is harmless where the same facts are shown by other competent evidence. *People v Hunt*, 170 Mich App 1, 13; 427 NW2d 907 (1988). In the instant case, the victim's son testified regarding his eyewitness account of what happened at the time of the shooting. He identified defendant as the person who shot the victim in a police photographic array and in a photograph presented at trial, and he also made an in-court identification of defendant. Further, Robert Jones testified that defendant was the person that shot the victim. Although there may be argument as to whether Jones had a motive to testify in the way that he did, no such argument may be made regarding the victim's son. It would appear that the only eyewitness without a motive to fabricate was the victim's son. Moreover, defendant was seen with a gun prior to the shooting, he was the individual that did most of the talking with the victim, and shell casings were found on the porch near where defendant was standing.

Additionally, we question the impact of Woolen's statements on the verdict rendered by the jury, where the jury, despite defendant's inability to cross-examine Woolen, was apprised of the numerous inconsistencies in Woolen's claims through the testimony of other witnesses.

Thus, there was ample evidence presented demonstrating that the prosecution established that any error was harmless beyond a reasonable doubt. Reversal is not required.

Next, defendant argues that the trial court committed error because it erroneously permitted the prosecutor to impeach D'Juan Yingling's credibility by exposing the existence of his pending felony charges. We disagree.

In *People v Martzke*, 251 Mich App 282, 291; 651 NW2d 490 (2002), this Court held that evidence of bias is always relevant on cross-examination, and bias arising from a past arrest without conviction is admissible, if relevant, as long as the probative value is not substantially outweighed by the danger of unfair prejudice.

In the instant case, the trial court indicated that the testimony was being elicited for the purpose of demonstrating Yingling's bias, rather than for the purpose of impeaching Yingling's testimony. Defendant has failed to demonstrate that such evidence was used for impeachment purposes. Further, the elicitation of such testimony was limited in that the prosecutor was permitted to inquire whether Yingling was charged with multiple felony counts by the Oakland County Prosecutor's Office. Accordingly, we find that the admission of Yingling's pending felony charges by the Oakland County Prosecutor's Office was properly permitted in order to demonstrate bias.

Next, defendant argues that the prosecutor committed misconduct during the trial by unfairly vouching for the credibility of key prosecutorial witnesses. We disagree.

In order to preserve an issue of prosecutorial misconduct for appellate review, a defendant must timely and specifically object to the alleged improper misconduct. *People v Schutte*, 240 Mich App 713, 720; 613 NW2d 370 (2000). In the instant case, defense counsel did not specifically object to any of the alleged improper statements during the prosecutor's closing argument or during the prosecutor's rebuttal argument. Accordingly, this issue has not been properly preserved for appellate review.

“Absent an objection at trial to the alleged misconduct, appellate review is foreclosed unless a defendant demonstrates plain error that affected his substantial rights, i.e., error that was outcome determinative.” *People v Leshaj*, 249 Mich App 417, 419; 641 NW2d 872 (2002). “Reversal is warranted only when the error resulted in the conviction of an actually innocent defendant or when the error seriously affected the fairness, integrity, or public reputation of judicial proceedings.” *Id.*

This Court reviews prosecutorial misconduct in context to determine whether the defendant was denied a fair and impartial trial. *Id.* Generally, prosecutors are given great latitude regarding their arguments and conduct. *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995). The prosecutor may comment on a witness’ credibility and is free to argue from the evidence and inferences to be drawn therefrom. *People v Stacy*, 193 Mich App 19, 37; 484 NW2d 675 (1992). “[A]n otherwise improper remark may not rise to an error requiring reversal when the prosecutor is responding to the defense counsel’s argument.” *People v Kennebrew*, 220 Mich App 601, 608; 560 NW2d 354 (1996). “No error requiring reversal will be found if the prejudicial effect of the prosecutor’s comments could have been cured by a timely instruction.” *Leshaj, supra* at 419.

First, defendant contends that the prosecutor made the following improper comment during his closing argument regarding Robert Jones: “You saw his demeanor, his mannerisms, how credible he was, how difficult it was for him to testify here.” When reviewed in context, we find that this statement is not improper as the prosecutor did not unfairly vouch for Jones’ credibility, but rather, it was proper comment on the evidence and Jones’ credibility.

Defendant also points to several statements made by the prosecutor during his rebuttal argument and contends that such statements were improper. First, defendant contends that the prosecutor erred in stating: “In fact, Jones, as Rourke told us when he first went in there with wanting to protect his friend, the defendant, over what was happening . . . .” Next, defendant contends the prosecutor erred in stating:

[Jones] did not come in here screaming, hollering, defendant did it, defendant did it, defendant did it, I didn’t, defendant did it. He didn’t even want to testify against his good friend here. He wanted nothing to do with it in fact. You saw him say how hard it was and how hard it was from his demeanor and the way he looked and acted. It wasn’t because he was worried about someone accusing him. It was because on the street you’re worried about ever having testified against anybody including one of your best friends that you had for many years.

Finally, defendant contends that the prosecutor committed error by stating, regarding the victim’s son:

How in the world is that boy ever going to be able to pick the defendant our [sic] of that line up unless he knows, and he does, and he’s right and he is, that the defendant is the one who shot his daddy.

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How in the world are they going to suggest an eight year old boy who they wake up out of his sleep who to pick.

We find that the prosecutor's comments were proper rebuttal arguments to statements made during defense counsel's closing argument. Regarding Jones, defense counsel focused on Jones' motivation for testifying that defendant was the person that shot the victim. Regarding the victim's son, defense counsel argued that he was under extreme emotional stress at the time of the shooting, and that his view of the incident was hindered based on the victim's position in the doorway. Further, defense counsel indicated that the victim's son may have been directed in some subtle form with regard to the photographic array in that each of the persons present at the time of the incident were in the second position. Finally, defense counsel then provided a summary of the inconsistencies within the son's testimony and prior identifications. Thus, the prosecutor's remarks were a proper response to defense counsel's arguments.

Defendant finally presents several arguments pursuant to his Standard 11 brief. First, defendant argues that the evidence was insufficient to support his conviction on each of the three crimes for which he was convicted. When ascertaining whether sufficient evidence was presented at trial to support a conviction, this Court must view the evidence in a light most favorable to the prosecution and determine whether a rational trier of fact could find that the essential elements of the crime were proved beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992). This Court will not interfere with the trier of fact's role of determining the weight of evidence or the credibility of witnesses. *Id.* at 514-515. The extent of defendant's argument is that except for the testimony of Jones and the victim's son, there was no evidence to support the convictions. Defendant's acknowledgment that there was evidence to support the convictions vitiates his argument. The testimony of two eyewitnesses present at the scene of the crime is sufficient to support the convictions, and any issues regarding their credibility was for the jury, not this Court.

Next, defendant presents a myriad of ineffective assistance of counsel claims. In *People v Carbin*, 463 Mich 590, 599-600; 623 NW2d 884 (2001), our Supreme Court, addressing the basic principles involving a claim of ineffective assistance of counsel, stated:

To justify reversal under either the federal or state constitutions, a convicted defendant must satisfy the two-part test articulated by the United States Supreme Court in *Strickland v Washington*, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984). See *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994). "First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not performing as the 'counsel' guaranteed by the Sixth Amendment." *Strickland, supra* at 687. In so doing, the defendant must overcome a strong presumption that counsel's performance constituted sound trial strategy. *Id.* at 690. "Second, the defendant must show that the deficient performance prejudiced the defense." *Id.* at 687. To demonstrate prejudice, the defendant must show the existence of a reasonable probability that, but for counsel's error, the result of the proceeding would have been different. *Id.* at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* Because the defendant bears the burden of demonstrating both deficient performance and

prejudice, the defendant necessarily bears the burden of establishing the factual predicate for his claim. See *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999).

Defendant first argues that counsel was ineffective for failing to challenge the statements made by the prosecutor during closing arguments as recited by us earlier in this opinion. As noted above, the prosecutor's statements were not improper; therefore, counsel was not ineffective because any objection would have been meritless and futile. *People v Snider*, 239 Mich App 393, 425; 608 NW2d 502 (2000). Defendant next claims that counsel was ineffective for failing to object with respect to the prosecutor's improper vouching, misstatements concerning the testimony presented, and improper comments on the evidence. We can only assume that these alleged improprieties are different than those presented earlier. Defendant, besides referencing numerous transcript page numbers, fails to identify the offending comments and language. Therefore, we deem this issue waived. *People v Leonard*, 224 Mich App 569, 588; 569 NW2d 663 (1997). Defendant next asserts that counsel was ineffective for failing to request suppression of any in-court identification testimony where pretrial identification procedures were unduly suggestive and prejudicial, and minimally, the case should be remanded for an evidentiary hearing regarding the specific circumstances surrounding any pretrial identification procedures. We find no reason to remand for an evidentiary hearing; the record sufficiently reflects that the in-court identifications were proper. See *People v Kachar*, 400 Mich 78, 95-97; 252 NW2d 807 (1977).

Defendant finally argues prosecutorial misconduct arising out of alleged inaccurate comments on the evidence and improper vouching during closing arguments. Reviewing the record and the claims asserted by defendant, we find that the prosecutor properly commented on the evidence presented at trial and reasonable inferences therefrom. *Stacy, supra* at 37. We note that defendant's argument that the prosecutor did not accurately convey the testimony of the victim's son is misplaced, where defendant cites preliminary examination testimony as opposed to the testimony of the son at trial. When the closing argument is viewed in context, it is clear that defendant was not denied his right to a fair and impartial trial. *Leshaj, supra* at 419. Additionally, the prosecutor was not vouching for numerous witnesses as claimed by defendant, but rather the prosecutor was fairly commenting on the witnesses' credibility based on the evidence. *Stacy, supra* at 37.

Affirmed.

/s/ William B. Murphy  
/s/ Mark J. Cavanagh  
/s/ Janet T. Neff